

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of Application of	)	
	)	
CONCORDIA UNIVERSITY TEXAS	)	File No. 0005412965
	)	
For Modification of Educational Broadband	)	
Service Station WLX201 to Expand Geographic	)	
Service Area	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 28, 2014**

**Released: March 31, 2014**

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we deny a waiver request filed by Concordia University Texas (“Concordia”) to allow it to expand its geographic service area (“GSA”) to include the area formerly included in the GSA of a co-channel licensee that was recently terminated.

**II. BACKGROUND**

2. On August 14, 1989, Concordia Lutheran College received a construction permit for Instructional Television Fixed Service (“ITFS”) Station WLX201 on the C group channels at Austin, Texas.<sup>1</sup> On September 25, 1998, the Commission released the *Two-Way Order*, which, among other things, granted all ITFS licensees a Protected Service Area (PSA) and individual protection to all receive sites registered through the date of the adoption of the *Two-Way Order*.<sup>2</sup>

3. On July 29, 2004, the Commission released the *BRS/EBS R&O*, which granted all ITFS incumbents a GSA based on their existing PSA, as described in former Section 21.902(d) of the Commission’s Rules.<sup>3</sup> ITFS was also renamed the Educational Broadband Service (“EBS”).<sup>4</sup> The PSA boundary for existing EBS stations was 35 miles from the authorized transmitter site.<sup>5</sup> The center points of PSAs were frozen as of September 15, 1995.<sup>6</sup> Accordingly, the GSA for an EBS station was initially

<sup>1</sup> File No. BPIF-19890403DA (granted Aug. 14, 1989). On February 10, 2009, an administrative update was filed changing the name of the licensee to Concordia University Texas. See File No. 0003734312.

<sup>2</sup> Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, MM Docket No. 97-217, 13 FCC Rcd 19112, 19173 ¶ 114 (1998) (“*Two-Way Order*”).

<sup>3</sup> Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, 14190-14191 ¶ 55 (2004) (“*BRS/EBS R&O*”).

<sup>4</sup> *Id.* at 14169 ¶ 6.

<sup>5</sup> *Id.* at 14190 n.123.

<sup>6</sup> *Id.*

defined as a circle having a 35 mile radius and centered at the station's reference coordinates, which were the center point for the station's PSA.<sup>7</sup>

4. The Commission recognized that changes to the rules for defining PSAs had resulted in many stations having overlapping PSAs.<sup>8</sup> It therefore adopted a mechanism, commonly known as "splitting the football," for dividing overlapping PSAs.<sup>9</sup> On January 10, 2005, when the new rules took effect,<sup>10</sup> Station WLX201 had an overlapping PSA with Station WLX937, licensed to Comal Independent School District ("Comal").<sup>11</sup> Accordingly, part of Station WLX201's PSA was incorporated within the GSA of Station WLX937.

5. All EBS licensees were required to demonstrate substantial service by November 1, 2011.<sup>12</sup> Failure by any EBS licensee to demonstrate substantial service by the deadline resulted in forfeiture of the license.<sup>13</sup> On February 12, 2012, the Universal Licensing System was updated to reflect that Comal's license for Station WLX937 automatically terminated on November 1, 2011 for failure to demonstrate substantial service.<sup>14</sup> The spectrum associated with Station WLX937 is currently unassigned.<sup>15</sup>

6. On September 25, 2012, Concordia filed an application to modify the license for Station WLX201 "to include service territory that was formerly included in the GSA of neighboring EBS Station WLX937 that has now been terminated."<sup>16</sup> Specifically, Concordia seeks part of the area that was formerly within Station WLX201's PSA but which was assigned to Station WLX937's GSA through the splitting the football process.<sup>17</sup> Concordia represents that if the Application is granted, it and its lessee, Clearwire Corporation, plan to immediately expand both the educational and commercial service that they provide in and around Austin, Texas into this additional GSA area.<sup>18</sup> Concordia contends that allowing it

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<sup>7</sup> See 47 C.F.R. § 27.1206(a)(1).

<sup>8</sup> *BRS/EBS R&O*, 19 FCC Rcd at 14192 ¶ 59.

<sup>9</sup> *Id.* at 14193 ¶ 63. In the "splitting the football" process, GSAs are divided by drawing a line between the intersection points between a licensee's PSA and the PSA of co-channel, adjacent market licensees. See 47 C.F.R. § 27.1206(a)(1).

<sup>10</sup> See *Facilitating the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 69 FR 72020-01 (Dec. 10, 2004).

<sup>11</sup> See File No. 0001635080 (granted Dec. 21, 2004).

<sup>12</sup> See 47 C.F.R. § 27.14(o), National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 ¶ 1 (WTB 2011).

<sup>13</sup> See 47 C.F.R. § 27.14(o).

<sup>14</sup> See 47 C.F.R. § 1.955(a)(2) (licenses automatically terminate for failure to meet construction or coverage requirements).

<sup>15</sup> The Commission has sought comment on developing a new mechanism for assigning unassigned EBS spectrum. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, *Second Further Notice of Proposed Rulemaking*, 23 FCC Rcd 5992, 6060-6068 ¶¶ 180-204 (2008).

<sup>16</sup> File No. 0005412965 (filed Sep. 25, 2012, amended Sep. 27, 2012) ("Application"), Exhibit to Form 601 ("Waiver Request") at 1.

<sup>17</sup> Concordia notes that other licensees split the football with Station WLX937 and could potentially seek to expand their GSAs in the manner sought by Concordia. See Waiver Request at 3 n.2. In requesting an expanded GSA, Concordia assumed that it would split the football with those other licensees. *Id.*

<sup>18</sup> *Id.* at 1.

to expand its GSA would be consistent with the Commission's treatment of incumbent Broadband Radio Service licenses, where the spectrum associated with a cancelled incumbent license reverts to the holder of the relevant Basic Trading Area licensee.<sup>19</sup> Concordia argues that if its waiver request is denied, the spectrum will lie fallow for many years and that granting the Waiver Request is "the clearest path to efficient and effective use of the spectrum."<sup>20</sup> Concordia also believes it is a "unique circumstance" that it would not have been required to lose part of its PSA if Station WLX937 had not been licensed as of January 10, 2005.<sup>21</sup>

### III. DISCUSSION

7. An applicant seeking a waiver of the Commission's Rules must demonstrate either that: (i) the underlying purpose of the rule(s) will not be served or would be frustrated by application to the instant case, and that a grant of the waiver would be in the public interest;<sup>22</sup> or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>23</sup> We believe that Concordia has failed to justify a waiver under either prong of the waiver standard.

8. Concordia has not justified a waiver under the first prong of the waiver standard because a waiver would be inconsistent with the underlying purpose of the rule. We agree with Concordia that the underlying purpose of Section 27.1206 of the Commission's Rules is "to establish an objective and fair mechanism for determining the licensed areas of adjacent market, co-channel licensees with overlapping GSAs."<sup>24</sup> As part of that process, the Commission terminated any rights licensees might have in areas that were formerly part of their PSAs but were assigned to a neighboring licensee through the splitting the football process. If we granted Concordia a waiver, we would be undercutting the Commission's decision to adopt the splitting the football process by recognizing rights that the Commission terminated in 2005. We do not believe the cancellation of Comal's license in 2011 is a fundamental change that would justify reinstating rights taken away by the Commission in 2005.

9. We also conclude that Concordia's and Clearwire's promises to expand broadband service are not a sufficient public interest basis for a waiver. If we granted Concordia a waiver, much of the expanded GSA would be located in Hays County, Texas.<sup>25</sup> A subsidiary of Clearwire is the licensee of the BRS Basic Trading Area ("BTA") authorization for the Austin, Texas BTA,<sup>26</sup> which includes Hays County, and currently provides wireless broadband service in the area around San Marcos, Texas, which is the county seat of Hays County.<sup>27</sup> Neither Concordia nor Clearwire make any specific commitment to expand service to an area which is not currently receiving service. While Concordia argues that denying a waiver would result in the spectrum formerly licensed to Comal lying fallow, we believe that risk was inherent in the Commission's decision to adopt the splitting the football process. Granting a waiver to Concordia would be inconsistent with the Commission's decision to eliminate overlapping PSAs by adopting the splitting the football process.

<sup>19</sup> *Id.* at 2. See 47 C.F.R. § 27.1206(b).

<sup>20</sup> Waiver Request at 2-3.

<sup>21</sup> *Id.* at 2.

<sup>22</sup> 47 C.F.R. § 1.925(b)(3)(i).

<sup>23</sup> 47 C.F.R. § 1.925(b)(3)(ii).

<sup>24</sup> Waiver Request at 2.

<sup>25</sup> Compare Application, Current GSA Map and Expanded GSA Map.

<sup>26</sup> Call sign B027.

<sup>27</sup> See File No. 0004653164 (filed Mar. 15, 2011) (substantial service showing for B027).

10. Concordia's attempt to compare its situation to the situation where an incumbent BRS license is cancelled is not valid. In BRS, the GSA of a BTA licensee includes all areas within the BTA, except where there is a co-channel incumbent licensee.<sup>28</sup> Therefore, if an incumbent licensee is cancelled, the right to operate in that area automatically reverts to the BTA license holder.<sup>29</sup> In EBS, there is no equivalent of a BTA overlay license, and the Commission did not grant any EBS licensee a reversionary right to the spectrum of other licensees.

11. Concordia has failed to justify a waiver under the second prong of the waiver standard because there is nothing unique or unusual about the cancellation of Comal's license in 2011. According to the Universal Licensing System, over 140 EBS licenses were terminated for failure to demonstrate substantial service by the November 1, 2011 deadline. Presumably, many of those licenses had split the football with other licensees in 2005. If we allowed all licensees in Concordia's situation to recapture PSAs that were awarded to other licensees in 2005, that could result in a significant change in GSAs throughout the country. In turn, those changes could affect neighboring licensees. Furthermore, we see nothing inequitable in refusing to recognize Concordia's claim to the spectrum when any rights it had to the area in question were extinguished over nine years ago, in January 2005. We therefore deny Concordia's Waiver Request and direct dismissal of its Application.

#### IV. CONCLUSION AND ORDERING CLAUSES

12. Concordia's Waiver Request is inconsistent with the Commission's decision to adopt the splitting the football process to eliminate overlapping PSAs. It has failed to offer sufficient public interest benefits to warrant deviating from the splitting the football process adopted the Commission. It has also failed to show that its situation is unique. We therefore deny the Waiver Request.

13. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.925 and 27.1206 of the Commission's Rules, 47 C.F.R. §§ 1.925, 27.1206, that the request for waiver filed by Concordia University Texas on September 25, 2012 in connection with File No. 0005412965 IS DENIED.

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<sup>28</sup> See 47 C.F.R. § 27.1206(a)(2).

<sup>29</sup> See 47 C.F.R. § 27.1206(b).

14. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.925 and 1.934(d)(2) of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.934(d)(2), that the licensing staff of the Broadband Division SHALL DISMISS the application for major modification of EBS Station WLX201 filed by Concordia University Texas on September 25, 2012 (File No. 0005412965).

15. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble  
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